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ATTORNEY GENERAL

Office of the Attorney General
State of Texas

April 30, 1991

Mr. Jerry C. Gilmore
Vial, Hamilton, Koch & Knox
1717 Main Street
Suite 4400
Dallas, Texas 75201

OR91-225

Dear Mr. Gilmore:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your requests were assigned ID#s 11,015 and 11,260.

You have received two requests for information under the act. Your first request lists the name of certain plaintiffs and the citation numbers and docket numbers of their cases and seeks the "Judgment, Final Disposition and accompanying documentation" for those cases. You assert that the records are excepted from required public disclosure under sections 3(a)(3) and 2(1)(G) of the Open Records Act. Section 3(a)(3) of the act excepts:

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

In your letter requesting our decision, you assert that the municipal court records are excepted from disclosure because of pending litigation brought against

the town and several of its officers and employees by a former municipal court clerk, alleging that her employment was wrongfully terminated. You state that an audit was undertaken by a certified public accounting firm "to evaluate the status and condition" of the town's municipal court records. The information that you have submitted to us as being responsive to the request consists of the audit report. We understand you to assert that the audit report formed, in part, the basis for the termination of the plaintiff's employment and will comprise part of the evidence that will be adduced in trial. We understand you to construe the request submitted to you to ask for the audit report.¹ We conclude that the municipal court records that the requestor seeks are not subject to the act; we conclude that the audit report is excepted from disclosure under the act.

We do not construe the request to ask only for the audit report. Exhibits 1, 2, and 3, which are copies of the request letters, consist of a list of 18 names and the citation numbers and dockets numbers of their cases and seeks "the Judgment, Final Disposition and accompanying documentation" of those cases. With respect to the municipal court records, we note that section 2(1) of the act defines "governmental body" for purposes of the act; subsection (G) specifically provides that the judiciary is not included within the definition. In other words, records of the judiciary do not fall within the ambit of the Open Records Act. *See, e.g.,* Open Records Decisions Nos. 513 (1988) (information in constructive possession of grand jury is not subject to the Open Records Act); 25 (1974) (records of justice of the peace are not subject to Open Records Act, but are subject to common law and statutory rights of inspection). Therefore, we conclude that the municipal court records sought in this instance are not subject to the Open Records Act, but are subject to common law and statutory rights of inspection. Because the authority conferred on this office by section 7 of the Open Records Act is limited to a determination as to whether requested information falls within the act's stated exceptions from disclosure, we are not authorized by the act to address any discussion of such rights.

With respect to the audit report, we note that two tests must be satisfied in order for information to fall within the section 3(a)(3) exception to disclosure. First, it must be established that litigation is pending or reasonably anticipated. You have

¹In addition to the court records, the request seeks access to "accompanying documentation" for those cases. It is not clear from the request to what this phrase refers. Nor is it clear from your submission, because you submitted to us only a copy of the audit report, not copies of the court records themselves. For purposes of this letter, we will accept your apparent construction of the request and assume that the phrase refers to the audit report.

satisfied the first test. *See* Open Records Letter OR90-528. Second, it must be demonstrated that the requested information relates to the pending or anticipated litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). In this instance, the audit report analyzing and categorizing the municipal court records formed the basis, in part, for the termination. Accordingly, we conclude that the audit report may be withheld under section 3(a)(3).

Your second request seeks a copy of a new records management policy adopted by the city council of the town of Flower Mound. You construe the request to ask for a copy of what you characterize as "a record security position paper" that the council discussed in executive session² (Exhibit 6) and for a memorandum from you explaining the necessity for such a policy (Exhibit 5):

[The] current request deals with the release of a new records management policy. As an initial matter, it should be noted that the Town Council has not adopted a new records management policy. Indeed, the Town's policy regarding records management and records preservation and recovery are Town ordinances and as such are available for public inspection and copying. *See* Exhibits 3 and 4, attached hereto.

[The requestor] presumably is referring to a record security position paper which was discussed in executive session of the Town Council several weeks ago. A copy of a confidential memorandum to the Mayor and Town Council from me explaining the necessity for such a document in light of the facts presented in that confidential memorandum is attached hereto as Exhibit 5. Additionally, the records security document is attached hereto as Exhibit 6.

You indicate that if the request properly should be construed to seek a copy of the policy adopted by the council as an ordinance, that ordinance is, of course,

²We note that this office has held that the mere fact that a document was discussed in an executive session conducted under the Open Meetings Act does not automatically render such a document excepted from disclosure under the Open Records Act. Open Records Decision No. 485 (1987).

open to the public. We agree. *See* Open Records Decision No. 551 (1990). Thus, Exhibits 3 and 4 must be released.

With regard to what you describe as a "record security position paper" and the memorandum from you to the council explaining the need for such a paper, you claim that these documents are excepted in their entirety either by sections 3(a)(3), 3(a)(1), or 3(a)(7):

As has been described on numerous occasions in my past correspondence to you (open records opinion requests dated June 27, July 6, July 20, September 26, October 12, November 1 and November 6, 1990), [a named plaintiff] has two federal lawsuits pending against the Town and several Town officials and employees. Due to the issues raised in the confidential memorandum to the Mayor and Town Council (Exhibit 4 [sic]) regarding the litigation, the records security policy position paper was devised. This policy position paper was generated relative to the aforementioned litigation and therefore is protected from disclosure pursuant to Section 3(a)(3) of the Open Records Act. Further, to the extent the policy position paper represents attorney work product and confidential attorney-client communication, it is excepted from disclosure pursuant to Sections 3(a)(1) and 3(a)(7) of the Open Records Act.

You first argue that the position paper and memorandum are excepted from public disclosure under section 3(a)(3). We have examined the documents and we disagree. The litigation to which you refer does not involve any policy, procedures, or actions regarding the custodians of Flower Mound's records *qua* custodians; neither the policy position paper regarding the proper procedures for handling records and open records requests nor the memorandum is at issue in the lawsuit. Rather, the litigation involves the alleged wrongful termination of a former employee of the town. Accordingly, we conclude that the requested information is not "related" to the litigation for purposes of section 3(a)(3) and is not excepted from disclosure thereby.

Additionally, you claim that the documents are excepted under sections 3(a)(1) and 3(a)(7) as attorney work product and confidential attorney-client communication. Section 3(a)(1) of the act excepts

information deemed confidential by law, either Constitutional, statutory, or by judicial decision.

Section 3(a)(7) of the act excepts

matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure. (Footnote omitted.)

In Open Records Decision Nos. 574 and 575 (1990), copies of which are enclosed, this office discussed both the application of the attorney client privilege and the doctrine of attorney work product under sections 3(a)(1) and 3(a)(7). In Open Records Decision No. 575, this office declared:

In Open Records Decision No. 574 (1990), we explicitly overruled Open Records Decision No. 304 [which invoked the attorney work product privilege to withhold information under section 3(a)(1)] to the extent it dealt with work product doctrine under section 3(a)(1) and held that the section 3(a)(3) requirements must be fulfilled before we will allow exceptions for an attorney's worked product. We now explicitly state that we do not consider discovery privileges to be covered under section 3(a)(1) of the act. Such information is "privileged" only to the extent that the court in a particular case deems it to be so. We do not believe that this is the type of information that section 3(a)(1) was intended to protect as information deemed confidential by law. Of course, some discovery privileges will be covered under other sections of the statute. For example, the attorney-client privilege is within the coverage of section 3(a)(7), and, as noted above, an attorney's work product may come within the section 3(a)(3) litigation exception.

Id. at 2.

We reject your arguments under sections 3(a)(1) and 3(a)(3); therefore, the requested documents may not be withheld under these sections. However, we do conclude that the memorandum may be withheld under section 3(a)(7):

This office has dealt with confidentiality in the attorney-client relationship on numerous occasions. *See, e.g.,* Open Records Decision Nos. 462 (1987); 429 (1985); 210 (1978). As for privileged material under the confidentiality rule, it is important to note that the privilege does not attach to every communication between the parties within its scope. *See* Open Records Decision Nos. 462; 429 (containing a discussion of the attorney-client privilege). When communications from attorney to client do not reveal the client's communications to the attorney, prior decisions of this office have held that section 3(a)(7) protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *See, e.g.,* Open Records Decision No. 462 (citing *North American Mortgage Investors v. First Wisconsin Nat'l Bank of Milwaukee*, 69 F.R.D. 9, 11 (E.D. Wis. (1975))). Basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *See* Open Records Decision Nos. 556 (1990); 462 (1987).

Id. at 3. Because the requested memorandum reveals your legal opinion or advice, we conclude that it may be withheld from disclosure. Therefore, you may withhold Exhibit 5.

However, we conclude that the "position paper" must be released. Section 6 of the act provides in pertinent part:

Without limiting the meaning of other sections of this Act, the following categories of information are specifically made public information:

....

(10) substantive rules of general applicability adopted as authorized by law, and *statements of general policy or*

interpretations of general applicability formulated and adopted by the agency. (Emphasis added.)

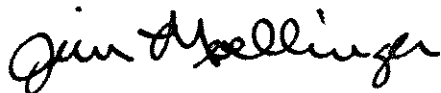
The document that you describe as a "record security position paper" is, by its very terms, a "policy" of general applicability regarding the security of records in the custody of the town. Because it falls squarely within the ambit of section 6(10) of the act, we conclude that it must be released. Therefore, you must release Exhibit 6.

We have considered the exceptions you claimed, specifically sections 3(a)(3), 3(a)(1), and 3(a)(7) and have reviewed the documents at issue. Previous determinations of this office, Open Records Decision Nos. 574 and 575 (1990), copies of which are enclosed, resolve your request. For this reason, you may withhold the requested information as indicated in this decision.

We note that this office has received a copy of a letter directed to the Records Management Officer from a Ms. Jill Zupancic, dated November 10, 1990, requesting five categories of financial information. In your correspondence to this office, you neither ask us whether such information is excepted from disclosure nor raise any exceptions to its release. Therefore, pursuant to section 7 of the Open Records Act, the requested information is presumed to be open.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-225.

Yours very truly,



Jim Moellinger
Assistant Attorney General
Opinion Committee

JM/mc

Ref.: ID#s 11260, 11015, 11134, 11093, 11169, 11189, 11318, 11427, 11609.

Enclosures: Open Records Decision Nos. 574 and 575 (1990); Open Records Letter OR90-528 (1990).

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